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November 14, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 12, 2006

Case Number: TSO-0413

This Decision concerns the eligibility of xxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

On May 26, 2006, the DOE issued a notification letter to the individual. Attached to the notification letter was a statement entitled "Information creating a substantial doubt regarding eligibility for an Access Authorization" (hereinafter referred to as the "information statement"). The information statement indicates that the individual was arrested for disorderly conduct as a result of being intoxicated in 1977. Information statement at 5a. He was arrested for Driving Under the Influence of alcohol (DUI) in the 1980s. Information statement at 5b. In April 1989 he was arrested for sexual assault when he was intoxicated. Information statement at 5c. He was arrested for DUI in March 1996 and June 1996. Information statement at 5e. Finally, he was arrested for DUI in March 2004. Information statement at 5f.

The individual was evaluated by a DOE consulting psychiatrist on December 5, 2005. In his December 6 report the DOE consulting psychiatrist diagnosed the individual with alcohol abuse. The DOE consulting psychiatrist report is DOE Exhibit #7.

The notification letter finds that the alcohol incidents and the diagnosis of alcohol abuse by a DOE consulting psychiatrist create a security concern under Criterion J. 10 C.F.R. §710.8(j).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

At the hearing, the individual was represented by counsel who indicated in his opening statement that he would present the testimony of the individual, the individual's sister, his friends and co-workers. He stated that their testimony would demonstrate that the individual has significantly reduced his consumption alcohol, and that the past alcohol related "indiscretions" are unlikely to recur. Transcript of Hearing (Tr.) at 7. The individual also presented the testimony of a psychiatrist who evaluated him prior to the hearing (hereinafter the "individual's psychiatrist"). At the hearing, the DOE presented the testimony of the DOE consulting psychiatrist (hereinafter the "DOE consulting psychiatrist"). Below is a summary of the testimony at the hearing.

II. HEARING

A. The Individual

The individual testified that after his March 2004 DUI arrest, he decided it was time to reduce his level of alcohol consumption. Tr. at 14. Between March 2004 and January 2006 he has limited his alcohol consumption to one or two drinks per day, he does not go to taverns, he has never become intoxicated, he has never driven an automobile after consuming alcohol, and he has been able to socialize with his friends without consuming alcohol. Tr. at 14-16. He testified that since March 2004 "... I have shown myself [as having] great restraint in getting to that point. I don't want to go through this ever again. I have a house that I need to take care of, and the only way I can take care of this house is to have this job. Tr. at 18.

He testified that since January 2006, he has further reduced his level of alcohol consumption. Tr. at 17. "I hardly drink. I don't go out and drink. I have very little association with alcohol." Tr. at 21. He indicated he currently has no more than 4 or 5 beers in any one week. Tr. at 19. He testified that if he lost his job he would not increase his level of alcohol consumption. Tr. at 22.

The individual explained the reason for the change in his behavior. "Getting older, you learn through your mistakes. As my record shows, I've made quite a few. I'm finally taking things the way they are coming and I'm leaving all the bad stuff behind me and I'm looking forward to a good future." Tr. at 20. He believes that in the last two and a half years he has demonstrated to his "family members that I am finally straightening my life out." Tr. at 23.

B. The Individual's Five Co-Workers

The individual's first co-worker testified that he has known and worked with the individual for five years. Tr. at 26. The co-worker testified that the individual is professional and takes his job very seriously. Tr. at 28. He has been to the individual's house two times for picnics, and on another occasion he attended a dinner hosted by their mutual supervisor. Tr. at 27 and 30. At all of those occasions the individual consumed alcohol in a responsible manner. Tr. at 30. He has never seen the individual consume alcohol to excess or to drive after he has consumed alcohol. Tr. at 30.

The individual's second co-worker testified that he has worked with the individual for four or five years. On occasional projects he was the direct supervisor of the individual. Tr. at 33. He testified that the individual is very professional and is trustworthy. Tr. at 33. He has interacted with the individual socially

on several occasions and he has been in the individual's home on a number of occasions. Tr. at 34 and 37. He has seen the individual consume alcohol, but never to excess. Tr. at 34. He has never seen the individual drink on the job. Tr. at 34. He stated that on the job the individual behaves professionally at all times. Tr. at 35.

The individual's third co-worker testified that he has known the individual for five or six years. He also was occasionally the direct supervisor of the individual. Tr. at 38. He believes the individual is a "fantastic employee." Tr. at 40. He attended the two picnics at the individual's home described by the individual's first friend. He testified that during both picnics the individual's consumption of alcohol was moderate. Tr. at 42. He testified that the individual would never violate any security regulation and if he is able to return to the job he would like to have the individual work for him. Tr. at 44.

The individual's fourth co-worker testified that she has known the individual for six years. Tr. at 51. She has worked with the individual on a number of projects. Tr. at 51. She testified that the individual is a very good worker. Tr. at 51. She has never seen the individual consume alcohol to excess. Tr. at 53.

The fifth co-worker is the lead supervisor of the individual and the four co-workers who testified at the hearing. Tr. at 46. He testified that he has known the individual for four years and has socialized with him five or six times. Tr. at 46. The individual consumed one drink at each of those social occasions. Tr. at 49. He has never seen the individual's behavior indicate that he was under the influence of alcohol. Tr. at 47.

C. The Individual's Friends

Both of the individual's friends and his sister testified by telephone. They live in the individual's home town which is several hundred miles from the individual's current home. Tr. at 56 and 65. The individual visits his home town several times a year to visit his family.

This individual's first friend testified that she has known the individual since high school and she considers him to be a life long-friend. Tr. at 57. She visited the individual's home for four days in May 2006. She testified that "We didn't do very much drinking at all during that time." Tr. at 59. The individual's alcohol consumption was limited to beer and wine and she characterized the individual as "a light drinker." Tr. at 58. She indicated light drinking is three beers over three hours. Tr. at 63. She then discussed a high school class reunion in August 2005. At that event, he consumed alcohol in moderation. Tr. at 60. She also testified that she frequently talks to the individual on the telephone. Tr. at 60. These telephone calls take place at different times and she has never had any indication that the individual was under the influence of alcohol. Tr. at 60.

The individual's second friend testified that he has known the individual for 35 years. Tr. at 65. He occasionally talks with the individual on the telephone and he has breakfast with the individual when he visits his home town. Tr. at 65. He believes the individual has "changed his drinking habits quite a bit. I think [as he is getting older] . . . he's realizing that he's got to take care of his drinking problem, drinking less [or responsibly]." Tr. at 66. He has not seen the individual consume alcohol to excess in the last several years. Tr. at 66.

D. The Individual's Sister

The individual's sister testified that she lives in the individual's home town. Tr. at 71. She estimated that she sees the individual once every three months. Tr. at 73. She testified that five to seven years ago the individual would consume 4 to 6 beers at one time. Tr. at 77. She visited and stayed at the individual's home for three days a few weeks before the hearing. Tr. at 72. She discussed the individual's alcohol consumption during that visit. "During the course of the day, sometimes there was no alcohol. It was soda. Every once in a while, it was just a beer or two." Tr. at 75. She characterized the change as a drastic reduction in his consumption of alcohol. Tr. at 74. At no time during the visit did she see the individual under the influence of alcohol. Tr. at 75. She concluded by testifying

He has really changed his life around. He has really gotten serious about the things that he owns. He wanted to stay where he is. He likes the area. He doesn't want to mess it up. He really wants to change his life and make sure that he can continue doing what he's doing.

Tr. at 76.

F. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified by telephone. He confirmed that his December 6, 2005 report diagnosed the individual with alcohol abuse. Tr. at 83. He stated that since the individual was last arrested for DUI in March 2004, the individual has not had a five year period with no alcohol related problems. Tr. at 87. Since there has not been a five year period without an alcohol related problem he believes it is more likely than not that the individual's consumption of alcohol will cause a future problem. Tr. at 93.

The DOE consulting psychiatrist testified that many heavy drinkers reduce their level of alcohol consumption when they reach the age of 50 or 55. Tr. at 97. Nevertheless, the DOE consulting psychiatrist did not believe that the individual's age, 55, changes his standard of a five year period of no significant problem with alcohol in order to demonstrate rehabilitation. Tr. at 97.

G. The Individual's Psychiatrist

The individual's psychiatrist testified that he evaluated the individual on September 7, 2006. Tr. at 102. During that evaluation, he diagnosed the individual with alcohol abuse. Tr. at 103.

The individual's psychiatrist believes the individual is currently drinking responsibly, and it is likely that the individual will be able to continue his pattern of responsible consumption of alcohol. Tr. at 105. The individual's psychiatrist mentioned three factors that indicate the individual is likely to continue to drink responsibly in the future. The first positive factor is that the individual has a sincere desire to maintain his home and his job, and those goals are an ongoing motivation for him to reduce his consumption of alcohol. Tr. at 108 and 115. He testified that

[this individual]has reached an awareness that . . . the use of alcohol is not in his own personal best interest, not just a matter of it's not in his employer's best interest, but in his own life and well-being.

Tr. at 112.

The individual's psychiatrist believes alcohol relapses are often caused by stress and therefore the ability to manage stress would increase the individual's probability of maintaining his responsible drinking behavior. He testified that the individual finds satisfaction in working on his new home, and that this hobby will help the individual cope with the normal stressors in his life, thereby reducing the likelihood of a relapse. Tr. at 112. The final positive factor mentioned by the individual's psychiatrist is that the individual has developed the ability to socialize with friends and family without the use of alcohol. Tr. at 114.

The individual's psychiatrist also noted two factors that make it more likely that the individual will relapse. The first is that the individual continues to consume alcohol on a regular basis. This places the individual in a situation in which he may inadvertently consume alcohol to excess. Tr. at 112. The second factor is the individual's failure to receive alcohol counseling, which in his view could result in the individual's failure to understand the steps necessary to control his level of alcohol consumption.¹ Tr. at 111.

He indicated that considering all of the factors the individual's likelihood of relapse is low:

I can not predict exactly [the likelihood of a relapse], but the likelihood seems to be fairly low since he has reasons for controlling his drinking. One other thing is that individuals with this particular personality profile, as they get older, they have less need for excitement, less need for the kind of life that could be associated with bars and having friends in that kind of situation.

Tr. at 107.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the

¹ On November 14, 2006 I received a telephone call from an alcohol counselor. He indicated that the individual has enrolled in an 8 week group counseling program. He indicated that he would send me a letter providing the details of the program. I told him I would place his letter in the case file in this proceeding.

burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

As is evident from the description of the testimony at the hearing, both psychiatrists diagnosed the individual with alcohol abuse. The questions before me are whether the individual has demonstrated that he will drink responsibly in the future and whether that showing is sufficient to mitigate the security concern related to a diagnosis of alcohol abuse.

The two psychiatrists did not agree on whether the information presented by the individual confirms that he has overcome his pattern of abuse of alcohol. The DOE consulting psychiatrist testified that to mitigate the DOE security concern, the individual must demonstrate a five year period in which he has no significant problems with alcohol. In his view, this would support a 50% or less probability of relapse. The DOE consulting psychiatrist did not explain why he believes a 50% probability of relapse is the appropriate

standard for me to apply in this case. Nor did he indicate why a five year period without a relapse meets his 50% probability of relapse standard. I found his testimony very unenlightening and unsupported.

The individual's psychiatrist came to a different conclusion. He recognized that the likelihood that the individual will maintain his abstinence would be stronger if he had a better understanding of alcohol abuse and if he were abstinent. However, he testified that the individual is sufficiently aware of his problem that the chance he will drink to excess in the future is fairly low.

In this case, the individual believes that the testimony he has presented will convince me that he currently consumes alcohol moderately and that he will continue to do so. He believes such a showing is sufficient to convince me that he has mitigated the DOE security concern. I am not convinced that he is currently consuming alcohol moderately. Moreover, I do not believe that even if he were consuming alcohol in moderation, the DOE's security concern would be mitigated based on the current evidence.

Initially, I believe the individual continues to minimize the severity of his alcohol problem prior to 2004. He testified that before March 2004 he would drink "a couple of cocktails, but that would not be every night." Tr. at 16. The testimony of the individual's two friends and his sister indicated that the individual's current moderate consumption of alcohol is a significant change in his level of alcohol consumption. That testimony suggests that prior to 2004 he drank significantly more than "a couple of cocktails" on any given occasion. This conclusion is supported by the individual's five alcohol-related arrests prior to 2004. Therefore, I believe the individual is not being candid in his description of his alcohol consumption before March 2004.

I also do not believe the individual's statement that he is currently consuming no more than five beers per week. Tr. at 19. I was convinced by the co-workers testimony that the individual does not consume more than one drink when socializing with co-workers and that he never consumes alcohol on the job. However, I believe that the individual is not being candid about his level of alcohol consumption in other situations. The individual's first friend testified that the individual consumed 3 beers in three hours. Tr. at 63. His sister testified that during her recent visit to the individual's home he consumed alcohol "every once in a while, it was just a beer or two." Tr. at 75. She also testified that once during the visit when he was cutting down a tree the individual had more than two beers. Furthermore, the individual presented no testimony from social friends that live in his current town and could testify about his normal daily activities. Therefore, I am not convinced that his alcohol consumption has been limited to 4 to 5 beers a week. I am therefore not persuaded that he has consumed alcohol in moderation for the last year.

Moreover, even if the individual convinced me of this limited alcohol use, it would not be sufficient to mitigate the security concern. The individual brought forward no witnesses who had any particular knowledge of the individual's commitment to reduce his alcohol consumption. Therefore, I am not convinced that he has a support system in place to assist him if he were tempted to relapse into a pattern of excessive alcohol use. Further, the individual has not received any alcohol counseling, education or therapy which could provide him with some important insight into his condition of alcohol abuse, and make him aware of the signs of impending relapse.

In most Criterion J cases, individuals diagnosed with alcohol abuse resolve the security concerns by demonstrating a period of at least one year of abstinence, combined with a support system, such as AA, and some educational component, such as counseling. In the instant case, the individual has none of these. He has not been abstinent, he has no demonstrated support system, and he has not received educational

consulting related to his condition. Even if I believed his assertion of limited alcohol use during recent months, I do not believe that his program is sufficient, or that he will be able to maintain it in the long run.

Accordingly, the individual has not convinced me that there is less than a 30% chance he will resume consumption of alcohol to excess in the next five years. Under the circumstances presented here, the individual has not mitigated the concern regarding his use of alcohol. See *Personnel Security Hearing (Case No. TSO-0320)*, 29 DOE ¶ 82,920 (2006). Accordingly, I am not persuaded that he has mitigated the DOE's Criterion J security concern.

V. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concerns under Criterion J of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wiekert
Hearing Officer
Office of Hearings and Appeals

Date: November 14, 2006